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19 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

20 MAINE STATE RETIREMENT
21 SYSTEM, Individually and On Behalf
of All Others Similarly Situated,

22 Plaintiff,

23 vs.

24 COUNTRYWIDE FINANCIAL
25 CORPORATION, et al.,

26 Defendants.

No. 2:10-cv-00302-MRP(MANx)

CLASS ACTION

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR AN
AWARD OF ATTORNEYS' FEES
AND EXPENSES

DATE: October 28, 2013

TIME: 1:30 p.m.

CTRM: 12, Hon. Mariana R. Pfaelzer

27 [Caption continued on following page.]

1 WESTERN CONFERENCE OF
2 TEAMSTERS PENSION TRUST
3 FUND, Individually and On Behalf of
4 All Others Similarly Situated,

Plaintiff,

vs.

5 COUNTRYWIDE FINANCIAL
6 CORPORATION, et al.,

Defendants.

7
8 DAVID H. LUTHER, et al.,
9 Individually and On Behalf of All
Others Similarly Situated,

Plaintiffs,

vs.

12 COUNTRYWIDE FINANCIAL
13 CORPORATION, et al.,

Defendants.

No. 2:12-cv-05122-MRP(MANx)

CLASS ACTION

No. 2:12-cv-05125-MRP(MANx)

CLASS ACTION

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1 **I. INTRODUCTION**

2 After five-plus years of litigation, on June 25, 2013, Plaintiffs' Counsel in the
3 above-captioned actions ("*Luther*," "*Maine State*," and "*Western Conference*,"
4 collectively the "Actions") achieved a landmark \$500 million Settlement. This
5 Settlement was achieved only after (1) complex and hard-fought litigation, including a
6 reversal of the dismissal of the *Luther* action in the California Court of Appeal, and
7 (2) protracted arm's-length settlement negotiations and formal mediation under the
8 auspices of two private mediators. Absent Plaintiffs' Counsel's willingness to accept
9 the risks inherent in pursuing the novel legal theories implicated by the Actions, even
10 after dismissal and repeated removal, the Class likely would not have received any
11 recovery and certainly would not have received the Settlement presently before the
12 Court. Plaintiffs and their counsel respectfully submit that the outstanding result
13 achieved, as well as the heightened level of risk associated with Plaintiffs' Counsel's
14 continued litigation of the Actions, warrants the requested 17% fee.¹

15 In pursuing the Actions on behalf of the Class, Plaintiffs' Counsel overcame
16 many novel legal and procedural obstacles to obtain the \$500 million recovery. It is
17 notable that despite these obstacles, the recovery obtained is the **largest** class-wide
18 settlement in a mortgage backed security ("MBS") case to date, far surpassing the next
19 largest \$315 million settlement reached in *Public Employees' Retirement System of*
20 *Mississippi v. Merrill Lynch & Co., Inc.*, No. 1:08-cv-10841-JSR-JLC (S.D.N.Y.)
21 ("*Merrill Lynch MBS Settlement*") (attached hereto as Exhibit A).

22 The Settlement would not have been possible without the considerable efforts
23 of Plaintiffs' Counsel, who devoted nearly six years to the investigation, vigorous
24 prosecution and settlement of the Actions. During this period, Plaintiffs' Counsel
25 have not received any compensation for their efforts and have assumed all costs and

26 _____
27 ¹ Unless otherwise defined herein, capitalized terms shall have the same meanings as
28 set forth in the Stipulation which was previously filed with the Court. *Maine State*,
Dkt. No. 408; *Luther*, Dkt. No. 151; and *Western Conference*, Dkt. No. 132.

1 expenses, despite significant risks of non-recovery. Plaintiffs' Counsel have
2 persevered through numerous adverse trial court rulings in both the California state
3 and federal court systems, litigating issues of first impression before the Ninth Circuit
4 and the California Court of Appeal in order to maintain the viability of the Actions.
5 Plaintiffs respectfully submit that it was only through Plaintiffs' Counsel's skill,
6 persistence and advocacy that the Class was able to secure this exceptional recovery.

7 Importantly, Plaintiffs' Counsel's 17% fee request has been approved by each
8 of the named Plaintiffs in the Actions, which include five sophisticated public pension
9 funds (Iowa, Oregon, Orange County, Maine and Vermont) with large stakes in the
10 outcome of this litigation.² Each of these sophisticated Plaintiffs considered the
11 substantial risk assumed by Plaintiffs' Counsel in agreeing to the requested fee. These
12 Plaintiffs are exceptionally proud of the results achieved in the Actions and the efforts
13 both they and Plaintiffs' Counsel have expended in the process. The named Plaintiffs,
14 who have been involved throughout the course of the Actions, believe the requested
15 fee is fair and reasonable and justified in large part by the risk borne by Plaintiffs'
16 Counsel during the pendency of the litigation. *See* Named Plaintiff Decls.

17 The requested fee is also in accord with the legal fees awarded in other MBS
18 class action cases, as well as other traditional securities class action cases, in this
19 jurisdiction and elsewhere. For example, in the *Merrill Lynch* MBS Settlement, the
20 court awarded a 17% fee of a \$315 million settlement. Ex. A at 2. Likewise, in *Wells*
21 *Fargo*, the United States District Court for the Northern District of California awarded
22 a fee of 19.75% of a \$125 million settlement. *In re Wells Fargo Mortg.-Backed*
23

24 ² Filed herewith are the Declarations of named plaintiffs Maine Public Employees
25 Retirement System; David H. Luther; MashreqBank, psc; Iowa Public Employees'
26 Retirement System; Orange County Employees Retirement System; Western
27 Conference of Teamsters Pension Trust Fund; Oregon Public Employees' Retirement
28 System; Vermont Pension Investment Committee; Washington State Plumbing and
Pipefitting Pension Trust; Pension Trust Fund for Operating Engineers and the
Operating Engineer's Annuity Plans; and General Board of Pension and Health
Benefits of the United Methodist Church ("Named Plaintiff Decls.").

1 *Certificates Litig.*, No. 09-CV-1376-LHK, slip op., ¶4 (N.D. Cal. Nov. 14, 2011) (Dkt.
2 No. 475) (“*Wells Fargo MBS Settlement*”) (attached hereto as Ex. B at 2); *see also In*
3 *re Adelphia Commc’ns Corp. Sec. & Derivative Litig.*, No. 03-MDL-1529 (LMM),
4 2006 U.S. Dist. LEXIS 84621, at *16 (S.D.N.Y. Nov. 17, 2006) (awarding 21.4% fee
5 in \$455 million settlement); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d
6 752, 755 (S.D. Ohio 2007) (awarding 18% fee of \$600 million settlement); *In re*
7 *Lucent Techs., Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 430 (D.N.J. 2004) (awarding 17%
8 fee of \$667 million settlement).

9 The requested fee of 17% (*i.e.*, \$85 million) is also fair and reasonable under
10 the lodestar cross-check. As of August 31, 2013, Plaintiffs’ Counsel had expended
11 87,780.79 hours in the investigation, prosecution and resolution of the Actions, for a
12 lodestar (number of hours multiplied by the per hour rate) of \$40,209,519. The
13 resulting “multiplier” of 2.11 is comparable or lower than those approved in similar
14 cases. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002)
15 (affirming a fee that yielded a multiplier of 3.65 and noting that multipliers ranging
16 from 1-4 are normally applied in common fund cases); *see also Public Emps. Ret. Sys.*
17 *of Mississippi v. Merrill Lynch & Co., Inc.*, No. 08-cv-10841-JSR-JLC, slip op.
18 (S.D.N.Y. May 8, 2012) (awarding 2.3 multiplier on 17% fee of \$315 million
19 settlement) (Ex. A); *Wells Fargo MBS Settlement* (Ex. B at 3 – awarding 2.82
20 multiplier on 19.75% fee of \$125 million settlement); *Cardinal Health*, 528 F. Supp.
21 2d at 755 (awarding 5.9 multiplier on 18% fee of \$600 million settlement).

22 As is apparent from the amount of work performed and time invested in the
23 Actions – the first action was filed nearly six years ago – this was not a case where a
24 settlement was achieved at an early stage. Moreover, Plaintiffs’ Counsel prosecuted
25 the Actions on a wholly contingent basis since the inception of *Luther* in 2007,
26 receiving no payment for their efforts while being constantly exposed to the
27 possibility that they would achieve no recovery at all and, therefore, no compensation.
28 The risk of obtaining no recovery in this matter was extremely high, given the

1 numerous adverse rulings which had to be overcome, as well as the novel legal and
2 factual issues facing Plaintiffs in these complex MBS Actions. In fact, if the *Luther*
3 Plaintiffs had not successfully appealed the state court's dismissal of the *Luther*
4 action, it is beyond question that the Class would have had no viable claims following
5 the Court's November 2012 decision regarding cross-jurisdictional tolling in *FDIC v.*
6 *Countrywide Fin. Corp.*, No. 2:12-cv-4354-MRP-MAN, 2012 U.S. Dist. LEXIS
7 167696 (C.D. Cal. Nov. 21, 2012) ("*Strategic Capital*").

8 While Plaintiffs' Counsel recognize that the requested fee award of \$85 million
9 is a large amount of money, they respectfully submit that it is justified in order to
10 compensate Plaintiffs' Counsel for incurring the risk of providing complex legal
11 services and assuming all expenses over the past six years, despite the real possibility
12 that they would not recover any fee at all.³ As the Seventh Circuit recently held in
13 approving a fee award of 27.5% of a \$200 million common fund created in a
14 traditional securities class action, "[c]ontingent fees compensate lawyers for the risk
15 of nonpayment. ***The greater the risk of walking away empty-handed, the higher the***
16 ***award must be to attract competent and energetic counsel.***" *Silverman v. Motorola*
17 *Solutions, Inc.*, Nos. 12-2339 & 12-2354, 2013 U.S. App. LEXIS 16878, at *5-*6 (7th
18 Cir. Aug. 14, 2013).⁴ In the Actions, as set out herein, the risk of no recovery was far
19 greater than in traditional securities class actions as evidenced by the fact that
20 Plaintiffs' Counsel are the only firms that filed complaints or moved for the position
21 of lead counsel in these coordinated actions in either federal or state court.

23 ³ Receiving no fee for years of work is more than just a theoretical possibility, as
24 such a result is not infrequent in securities class actions. For example, in the *Oracle*
25 *Securities Litigation*, Robbins Geller expended tens of millions of dollars in attorney
26 time and expenses only to see the case dismissed in its entirety at summary judgment.
Similarly, Kessler Topaz expended millions litigating the *BankAtlantic Securities*
Litigation through trial and a jury verdict in plaintiffs' favor, only to have the court
overturn the verdict and enter judgment for defendants.

27 ⁴ All emphasis is added and citations and footnotes are omitted unless otherwise
28 noted.

1 Accordingly, the risks borne by Plaintiffs' Counsel on behalf of Plaintiffs and the
2 Class, purely on a contingency basis, warrant the fee requested.

3 **II. WORK PERFORMED**

4 Plaintiffs' Counsel's tandem efforts in the Actions, which this Settlement
5 resolves, were critical to securing the \$500 million recovery for the Class. The *Luther*
6 action was the first and most extensive MBS case filed related to the financial crisis.
7 Plaintiffs' Counsel expended exhaustive efforts investigating and understanding the
8 complicated issues related to the origination, underwriting and securitization of the
9 underlying loans, and the rating and sale of the resulting Certificates. There was no
10 pre-existing road-map for Plaintiffs' Counsel to follow. At every turn there were
11 unique issues not present in traditional securities class actions related to standing,
12 statutes of limitations and repose, class certification, liability, loss causation and
13 damages. Notably, Plaintiffs' Counsel's filing of and efforts in the *Luther* action
14 protected a potential recovery for Class Members who purchased the 58 live tranches.
15 Indeed, but for the successful appeal resulting in the reversal of the state court's
16 dismissal of *Luther* on jurisdictional grounds in 2011, all of the Countrywide MBS
17 tranches likely would have been dismissed and there would have been no recovery for
18 the Class following this Court's ruling in *Strategic Capital*.

19 It was the independent and complementary efforts of Plaintiffs' Counsel in
20 *Luther*, *Western Conference* and *Maine State* that led to this exceptional Settlement.
21 In the *Luther* and *Western Conference* actions, over the past five and a half years,
22 Plaintiffs' Counsel have, *inter alia*:

- 23 • Investigated the substance of and filed extensive complaints in
24 November 2007, June 2008, September 2008 and October 2008;
- 25 • Successfully opposed defendants' 2008 removal of the action to federal
26 court, before this Court and the Ninth Circuit Court of Appeals. *See*
27 Order Granting Plaintiff's Motion for Remand to State Court and
28

Denying an Award of Attorney's Fees and Expenses, No. 2:07-cv-08165-MRP-MAN, 2008 U.S. Dist. LEXIS 26534 (C.D. Cal. Feb. 28, 2008); 533 F.3d 1031 (9th Cir. 2008);

- Filed an opposition to Defendants' Motion to Stay Discovery in October 2008;
- Prepared and filed an opposition to defendants' demurrers (related to jurisdiction, liability, loss causation and damages) to Plaintiffs' Complaint in 2009;
- Prepared and propounded requests for production of documents and interrogatories on defendants and third parties, and met and conferred on such discovery;
- Filed and briefed a Complaint for Declaratory Relief in this Court concerning whether SLUSA precludes state court jurisdiction over matters commenced under the Securities Act. *Luther v. Countrywide Fin. Corp.*, No. 2:09-cv-06162-MRP (MANx), Dkt. No. 1 (Aug. 24, 2009);
- Filed an action in federal court in an effort to preserve the statute of limitations with respect to the Class's Securities Act claims, following the dismissal of the *Luther* action in the state court;
- Litigated and won a state court appeal, which reversed the trial court's demurrer ruling dismissing the *Luther* matter on jurisdictional grounds. *Luther v. Countrywide Fin. Corp.*, 195 Cal. App. 4th 789, 125 Cal. Rptr. 3d 716 (2d App. Div. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 832, 181 L. Ed. 527 (2011);
- Filed an answer to defendants' Petition for Review of the California Court of Appeal's reversal of the state court dismissal;

- 1 • Prepared and filed an opposition to defendants' second round of
2 demurrers (related to standing, statute of limitations, and statute of
3 repose);
- 4 • Fully briefed and argued a second motion for removal to federal court
5 related to the bankruptcy filing of GMAC;
- 6 • Prepared and filed an extensive opposition to defendants' motion to
7 dismiss that was pending in federal court at the time of settlement, along
8 with oppositions to certain individual defendants' motions to dismiss and
9 Bank of America's motion to dismiss the *Western Conference* action;
- 10 • Commenced review, coding and/or analysis of 20 million pages of
11 documents produced by defendants and performed targeted searches
12 within these documents in order to prepare for further discovery,
13 summary judgment, trial, and mediation;
- 14 • Reviewed voluminous publicly-available documents, such as
15 information produced by the Financial Crisis Inquiry Commission
16 ("FCIC") regarding Countrywide and pleadings and other documents
17 filed in other actions related to Countrywide MBS and/or Countrywide's
18 loan origination and underwriting processes;
- 19 • Worked extensively with consultants and experts on complicated issues
20 related to loan underwriting, econometric and statistical analysis of loan
21 pools, securities ratings, loan-to-value ratios and owner-occupied rates;
- 22 • Worked extensively with economic experts on complex issues involving
23 loss causation and damages related to 58 different tranches of live claims
24 and the additional tranches underlying the Dismissed Represented
25 Claims and Dismissed Unrepresented Claims; and
26
27
28

- Prepared detailed mediation statements and presentations, and worked with damages experts in connection with the six month mediation.⁵

In *Maine State*, after being appointed as Lead Counsel, Plaintiffs' Counsel actively litigated the Securities Act claims in federal court through several motions to dismiss, class certification, merits discovery and mediation. In the *Maine State* action, Plaintiffs' Counsel, on behalf of the class, *inter alia*:

- Secured additional class representatives, whose participation was critical to the scope of the case;
- Filed three amended consolidated class action complaints in July, 2010; December, 2010; and June, 2011, and specifically addressed in the second and third amended complaints the Court's November 2010 and May 2011 Orders that denied, in part, defendants' motions to dismiss;
- Successfully defeated defendants' third motion to dismiss in September 2011;⁶
- Subpoenaed documents from more than 60 custodian banks, broker dealers, market-makers and investment banks to establish pricing information for the securities at issue as well as trading histories and trading volume for the securities, and to establish numerosity for purposes of class certification pursuant to Fed. R. Civ. P. 23 and to determine class damages;

⁵ A more expansive discussion of Plaintiffs' Counsels' efforts in *Luther* and *Western Conference* is set forth in the Joint Declaration of Spencer A. Burkholz and Andrew L. Zivitz in Support of (1) Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds; and (2) Plaintiffs' Counsel's Motion for Attorneys' Fees and Expenses ("Joint Declaration").

⁶ The litany of issues briefed is more fully set forth in the Declaration of Julie Goldsmith Reiser in Support of Maine State Plaintiffs' Motion for Final Approval of Proposed Class Action Settlement and Plan of Allocation, and Petition for Award of Attorneys' Fees and Reimbursement of Expenses. ("Reiser Declaration").

- 1 • Engaged in motion practice in the Northern District of Illinois to compel
2 third-party document production;
- 3 • Responded to discovery requests from six defendant parties on behalf of
4 the four named plaintiffs, which involved reviewing over one million
5 pages of documents from plaintiffs' asset managers and investment
6 advisors, producing responsive discovery to defendants and then
7 defending plaintiffs during their subsequent depositions;
- 8 • Sought to quash class certification discovery that defendants sought from
9 absent class members;
- 10 • Retained and oversaw the work of an expert who was deposed on issues
11 pertaining to numerosity and commonality for purposes of demonstrating
12 that class certification was appropriate;
- 13 • Obtained a stipulation to class certification after filing a motion to certify
14 the class and implemented a comprehensive notice program to inform all
15 potential class members of the scope of the certified class and their rights
16 as class members;
- 17 • Obtained and reviewed, in less than 12 months, the documents produced
18 in *In re Countrywide Fin. Corp. Sec. Litig.*, No. 2:07-cv-05295 (C.D.
19 Cal.) ("*New York Funds Action*"), consisting of approximately 20 million
20 pages, and thoroughly reviewed the documents and deposition transcripts
21 from an additional 51 witnesses who had knowledge relevant to the
22 claims at issue in *Maine State*, with the goal of identifying relevant
23 search terms and custodians and also to avoid seeking duplicative
24 discovery;⁷

25
26 ⁷ In *Maine State*, counsel reviewed, coded and analyzed over 11 million pages of
27 documents in just 18 months, leading to certification of the eight live tranches in that
28 action, a merits deposition program on the merits of the parties' claims and defenses,
and the production of five expert reports.

- 1 • Identified, through a review of the produced documents, 33 additional
2 Countrywide witnesses with knowledge relevant to the claims at issue,
3 who had not been custodians in the *New York Funds Action* production
4 and researched the propriety of using testimony to the SEC and FCIC as
5 evidence, as if taken in the *Maine State* litigation;
- 6 • Sought, within the same time period, documents and information related
7 to the viable MBS tranches in *Maine State* from defendants and
8 numerous non-parties, including loan files and due-diligence results, and
9 received, in total, over 1.75 million documents related specifically to the
10 *Maine State* claims;
- 11 • Conducted weekly meet-and-confer meetings with defendants on the
12 status of discovery, document productions, and the scheduling of
13 depositions;
- 14 • Propounded six sets of requests for production on all defendants and
15 additional requests for production on certain underwriter defendants, as
16 well as follow-up requests that came to light after certain depositions;
- 17 • Took 30(b)(6) and fact depositions in the summer of 2012 in connection
18 with the merits of the litigation;
- 19 • Fully and completely responded to more than 115 contention
20 interrogatories which would have formed the basis of the *Maine State*
21 plaintiffs' opposition had defendants filed motions for summary
22 judgment;
- 23 • Engaged and worked with five separate experts, including experts in
24 underwriting, investment bank due diligence, loan re-underwriting,
25 certificate valuation, investor losses, damages, and a rebuttal expert on
26 issues of loss causation and negative causation in anticipation of expert
27 reports that defendants would submit; and
28

- 1 • Drafted a mediation statement related to the eight tranches in the *Maine*
2 *State* litigation.⁸

3 In addition to their litigation efforts, Plaintiffs' Counsel in *Maine State* and
4 *Luther/Western Conference* collectively engaged in protracted settlement negotiations
5 with two full-day, in-person mediations and extensive telephonic meetings over a
6 period of seven months with defendants, which were presided over by Eric D. Green,
7 a private mediator who possesses more than 30 years of complex mediation
8 experience. The mediation process also included separate negotiations with the
9 Honorable Nancy Gertner (retired) concerning an appropriate plan for allocating the
10 \$500 million Settlement Amount among the various tranches and Offerings.

11 As noted above, Plaintiffs' Counsel have collectively expended 87,780.79 hours
12 investigating, prosecuting and resolving the Actions for a total lodestar value of
13 \$40,209,519. Plaintiffs and Plaintiffs' Counsel respectfully submit that the enormous
14 amount of time, resources and effort devoted to the Actions by Plaintiffs' Counsel and
15 the effective management of the Actions confirm that the fee request here is
16 reasonable.

17 **III. THE STANDARDS GOVERNING THE AWARD OF** 18 **ATTORNEYS' FEES IN COMMON FUND CASES**

19 **A. Plaintiffs' Counsel Are Entitled to a Fee from the Common** 20 **Fund They Created**

21 It is well-settled that an attorney who maintains a suit that results in the creation
22 of a fund or benefit in which others have a common interest is entitled to obtain
23 reasonable fees from that common fund. *Boeing Co. v. Van Gemert*, 444 U.S. 472,
24 478, 100 S. Ct. 745, 749, 62 L. Ed. 2d 676, 681 (1980) ("a litigant or a lawyer who
25 recovers a common fund for the benefit of persons other than himself or his client is
26 entitled to a reasonable attorney's fee from the fund as a whole"). The Ninth Circuit

27 ⁸ A more expansive discussion of plaintiffs' counsels' efforts in *Maine State* is set
28 forth in the Reiser Declaration.

1 has specifically found that “those who benefit from the creation of the fund should
2 share the wealth with the lawyers whose skill and effort helped create it.” *In re Wash.*
3 *Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) (“WPPSS”).

4 In addition to providing just compensation, awards of fair attorneys’ fees from a
5 common fund should also serve to encourage skilled counsel to represent those who
6 seek redress for damages inflicted on entire classes of people, and to discourage future
7 alleged misconduct of a similar nature. *See, e.g., Dolgow v. Anderson*, 43 F.R.D. 472,
8 481-84 (E.D.N.Y. 1968). Indeed, the Supreme Court has emphasized that private
9 securities actions, such as the instant action, provide “‘a most effective weapon in the
10 enforcement’ of the securities laws and are ‘a necessary supplement to [SEC] action.’”
11 *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310, 105 S. Ct. 2622,
12 2628, 86 L. Ed. 2d 215, 224 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426,
13 432, 84 S. Ct. 1555, 1560, 12 L. Ed. 2d 423, 428 (1964)).

14 **B. The Ninth Circuit Supports Awarding Attorneys’ Fees**
15 **Using the Percentage Approach**

16 The Supreme Court has also consistently held that where a common fund has
17 been created for the benefit of a class as a result of counsel’s efforts, the award of
18 counsel’s fees should be determined as a percentage of the fund. *See, e.g., Boeing*,
19 444 U.S. at 478-79; *Blum v. Stenson*, 465 U.S. 886, 900 n.16, 104 S. Ct. 1541, 1550
20 n.16, 79 L. Ed. 2d 891, 903 n.16 (1984) (“under the ‘common fund doctrine,’ . . . a
21 reasonable fee is based on a percentage of the fund bestowed on the class”); *see also*
22 Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D.
23 237, 242 (Oct. 8, 1985) (fee awards in common fund cases have historically been
24 computed based upon a percentage of the fund); 1 Alba Conte, *Attorney Fee Awards*
25 §2.02, at 31-32 (2d ed. 1993) (same). Although district courts retain discretion to
26 award attorneys’ fees in common fund cases based upon either the percentage-of-fund
27 or lodestar method (*see WPPSS*, 19 F.3d at 1296), the Ninth Circuit has implicitly
28

1 endorsed use of the percentage-of-fund method in most cases. *See, e.g., Vizcaino*, 290
2 F.3d at 1047-48; *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000).

3 **IV. THE REQUESTED FEE IS REASONABLE UNDER THE**
4 **PERCENTAGE-OF-RECOVERY METHOD**

5 While the ultimate determination of the proper amount of attorneys' fees rests
6 within the sound discretion of the district court (*see Rodriguez v. Disner*, 688 F.3d 645
7 (9th Cir. 2012)), the guiding principle in this Circuit is that a fee award should be
8 "reasonable under the circumstances." *Id.* at 653; *Rodriguez v. West Publ'g Corp.*,
9 563 F.3d 948, 967 (9th Cir. 2009). The Ninth Circuit has approved a number of
10 factors that are relevant to the district court's determination including: (1) the result
11 achieved, (2) the risk of continued litigation, (3) the financial burden of contingent
12 representation, and (4) customary fees awarded in similar cases. *See Vizcaino*, 290
13 F.3d at 1048-50.⁹ As demonstrated below, application of these factors confirms the
14 reasonableness of a 17% fee.

15 **A. The Result Achieved**

16 Courts have consistently recognized that the result achieved is a major factor to
17 be considered in determining the reasonableness of a fee award. *Hensley v. Eckerhart*,
18 461 U.S. 424, 436, 103 S. Ct. 1933, 1941, 76 L. Ed. 2d 40, 52 (1983) ("most critical
19 factor is the degree of success obtained"); *Vizcaino*, 290 F.3d at 1050. As noted
20 above, this is by far the largest MBS class action settlement arising out of the
21 subprime crisis and provides for an exceptional recovery on a per "live" certificate
22 basis (\$24.96 per \$1,000 in initial certificate face value).

23 The Settlement is also one of the largest (top 25) class action securities
24 settlements of all time. *See Securities Class Action Services, The SCAS TOP 100*

25 _____
26 ⁹ "The relative degree of importance to be attached to any particular factor will
27 depend upon . . . the nature of the claim(s) advanced, the type(s) of relief sought, and
28 the unique facts and circumstances presented by each individual case." *Atlas v.*
Accredited Home Lenders Holding Co., No. 07-cv-488-H (CAB), 2009 U.S. Dist.
LEXIS 103035, at *11 (S.D. Cal. Nov. 2, 2009).

1 *Settlements Semi-Annual Report* (Institutional Shareholder Services Inc. July 1, 2013),
2 available at <http://www.issgovernance.com/files/private/SCATop100Settlements>
3 [_2H2012Rev01312013.pdf](http://www.issgovernance.com/files/private/SCATop100Settlements_2H2012Rev01312013.pdf). The magnitude of this settlement is far greater than a
4 typical securities class action settlement. According to National Economics Research
5 Associates (“NERA”), which tracks the percentage of class actions resolved and
6 dismissed annually, over the period 2005-2008 the median securities class action
7 settlement was only \$7-\$9 million. Stephanie Planchich, Ph.D. & Svetlana Starykh,
8 *2008 Trends in Securities Class Actions* at 9 (NERA Economic Consulting, Dec.
9 2008), available at http://www.nera.com/67_5393.htm. It was the tenacious efforts of
10 Plaintiffs’ Counsel that led to this exceptional result. As noted above, but for
11 Plaintiffs’ Counsel’s aggressive litigation and willingness to successfully appeal the
12 *Luther* dismissal, a recovery of this magnitude would not have been possible.

13 **B. The Risks of the Litigation and the Novelty and Difficulty of**
14 **the Questions Presented**

15 Numerous cases have recognized that risk, as well as the novelty and difficulty
16 of the issues presented, are important factors in determining an appropriate fee award.
17 *See, e.g., Vizcaino*, 290 F.3d at 1048; *WPPSS*, 19 F.3d at 1299-1301. Uncertainty that
18 a recovery ultimately would be obtained is highly relevant in determining risk.
19 *WPPSS*, 19 F.3d at 1300.

20 Securities class actions are extremely risky. In fact, according to NERA,
21 somewhere between one third to one half of all modern day securities litigations filed
22 are dismissed. Dr. Jordan Milev, et al., *Recent Trends in Securities Class Action*
23 *Litigation: 2011 Year-End Review* at 22 Figure 26 (NERA Economic Consulting Dec.
24 14, 2011) (“*NERA Mid-Year 2011*”), available at [http://www.nera.com/nera-](http://www.nera.com/nera-files/PUB_Trends_Year-End_1211_final.pdf)
25 [files/PUB_Trends_Year-End_1211_final.pdf](http://www.nera.com/nera-files/PUB_Trends_Year-End_1211_final.pdf).¹⁰

26 ¹⁰ For example, in 2000, the most recent year for which all filed cases have now been
27 resolved, 37% of the cases were dismissed. The risk of losing appears to have
28 increased substantially since 2000. For cases filed in 2003, a year in which 95.5% of
the cases have now been resolved, the dismissal rate was 41%. The results for 2005
and 2006 were even worse. For 2005, with 96.3% of the cases filed that year having

1 The level of risk associated with complex MBS litigation, like the Actions, is
2 far greater than that presented by a typical securities class action. There is no question
3 that from the outset, the Actions presented a number of sharply contested legal and
4 factual issues, and that Plaintiffs' Counsel faced formidable challenges to proving
5 liability and damages on behalf of the Class. The Actions involved complex legal and
6 factual issues under the federal securities laws and presented novel issues of first
7 impression upon which district courts and even circuit courts have ruled differently,
8 particularly in the context of standing, tolling and class certification. It is beyond
9 question that the diverging rulings would continue if these cases were tested at
10 summary judgment and trial.

11 Beyond these hurdles, defendants have adamantly denied liability and asserted
12 that they had absolute defenses to Plaintiffs' claims, including most notably, that the
13 recession rather than their own conduct caused Plaintiffs' losses. *See Churchill Vill.,*
14 *L.L.C. v. GE*, 361 F.3d 566, 576 (9th Cir. 2004) (concluding that the district court
15 properly weighed and found sufficient risk to support fee award by evaluating
16 defendant's belief that it had strong defense to the merits of plaintiffs' claims).¹¹

17 The heightened level of risk undertaken by Plaintiffs' Counsel is further
18 illustrated by the fact that decisions by the courts presiding over the Actions rendered
19 recovery of Plaintiffs' Counsel's time unlikely. For example, as of March of 2010,

20 _____
21 been resolved, the dismissal rate was 49% and for 2006, with 94.7% of the cases filed
22 that year having been resolved, the dismissal rate was 44.3%. *NERA Mid-Year 2011*
at 13 Fig. 16.

23 ¹¹ The quality of opposing counsel is also important in evaluating the quality of the
24 work done by plaintiffs' counsel. *See, e.g., In re Equity Funding Corp. Sec. Litig.*,
25 438 F. Supp. 1303, 1337 (C.D. Cal. 1977); *In re King Res. Co. Sec. Litig.*, 420 F.
26 Supp. 610, 634 (D. Colo. 1976); *Arenson v. Bd. of Trade*, 372 F. Supp. 1349, 1354
27 (N.D. Ill. 1974). Plaintiffs' Counsel were opposed in the Actions by very skilled and
28 highly respected counsel from Goodwin Procter and eight other law firms with well-
deserved reputations for vigorous advocacy in the defense of complex civil cases such
as this. These counsel fought Plaintiffs' Counsel at every turn, necessitating
Plaintiffs' Counsel's incurring expenses of \$2,977,145 in expenses and expenditure of
\$40,209,519 in attorney time since November 2007. Each of these facts further
supports Plaintiffs' Counsel's fee request.

1 when the *Luther* action was dismissed by the state court after nearly 2.5 years of
2 litigation, Plaintiffs' Counsel in the *Luther* action had already provided over 16,500
3 hours of legal services with a lodestar value of over \$7.7 million. Joint Decl., ¶¶112,
4 176. Thus, in March of 2010, after a substantial amount of work had been dedicated
5 to the *Luther* action, Plaintiffs' Counsel stood to receive no compensation for their
6 efforts. Undeterred, Plaintiffs' Counsel in the *Luther* action vigorously pursued the
7 appellate rights of the Class in state court and filed an action in federal court in order
8 to protect the interests of the Class in the event that the appeal of the state court's
9 dismissal order was unsuccessful. Over the next 1.5 years, Plaintiffs' Counsel in the
10 *Luther* action expended another \$3 million in lodestar in successfully reversing the
11 state court's dismissal of the action. *Id.*, ¶176. Thus, by the time the case was back
12 before the state court in California in September of 2011, Plaintiffs' Counsel in *Luther*
13 expended considerable time and resources with little prospect of recovery. The
14 expenditure of \$10 million in legal time over a four-year period, when any sort of
15 recovery was highly unlikely, evidences the heightened level of risk presented by this
16 litigation. Similarly, the Court's *Strategic Capital* decision likely would have resulted
17 in the dismissal of the *Maine State* action after almost three years of litigation
18 involving the investment of nearly 40,000 hours of time. Had *Maine State* been
19 dismissed, *Maine State* counsel would have sacrificed almost all of its \$17.5 million in
20 lodestar and \$1.7 million in expenses. Reiser Decl., ¶¶80, 89. These facts reflect the
21 risk undertaken at all times in the Actions and weigh heavily in favor of approval of
22 the 17% requested fee.

23 **C. The Contingent Fee Nature of the Case and the Financial**
24 **Burden Carried by Plaintiffs' Counsel**

25 In addition to the risks associated with complex litigation, "the risk of non-
26 payment or reimbursement of expenses [in cases undertaken on a contingent basis] is
27 a factor in determining the appropriateness of counsel's proper fee award." *In re*
28 *Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 U.S. Dist. LEXIS 13555, at *68-*69

(C.D. Cal. June 10, 2005); *see, e.g., In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2007); *WPPSS*, 19 F.3d at 1299-301. “Contingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel.” *Motorola*, 2013 U.S. App. LEXIS 16878, at *5-*6.

It is an established practice in the private legal market to reward attorneys for taking on the risk of non-payment by paying them a premium over their normal hourly rates for prevailing in contingency cases. *See* Richard Posner, *Economic Analysis of Law* §21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless of whether they win or lose. *WPPSS*, 19 F.3d at 1299.

As noted above, the risk of no recovery in complex cases of this type is very real. As the court in *Xcel* recognized, “[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy.” *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005). Plaintiffs’ Counsel have experienced this risk firsthand. For example, as stated previously, in the *Oracle Securities Litigation*, Robbins Geller expended tens of millions of dollars in attorney time and expenses only to see the case dismissed in its entirety at summary judgment. *In re Oracle Corp. Sec. Litig.*, No. C 01-988 SI, 2009 U.S. Dist. LEXIS 50995 (N.D. Cal. June 16, 2009), *aff’d*, 627 F.3d 376 (9th Cir. 2010). Similarly, Kessler Topaz expended millions litigating the *BankAtlantic Securities Litigation* through trial and a jury verdict in plaintiffs’ favor, only to have the court overturn the verdict and enter judgment for the defendants, a judgment which was upheld on appeal. *See In re BankAtlantic Bancorp, Inc. Sec. Litig.*, No. 07-61542-CIV-UNGARO, 2011 U.S. Dist. LEXIS 48057 (S.D. Fla. Apr. 25, 2011), *aff’d sub. nom, Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d

1 713 (11th Cir. 2012). Indeed, there are numerous class actions in which plaintiffs'
2 counsel expended thousands of hours steering their clients past summary judgment
3 and/or trial, only to lose on appeal or on a post-trial motion and, thus, receive no
4 remuneration whatsoever despite their diligence and efforts.¹²

5 Because the fee in the Actions was entirely contingent, the only certainties were
6 that there would be no fee without a successful result and that such a result would be
7 realized only after considerable effort. To that end, Plaintiffs' Counsel committed
8 significant resources of both time and money to the vigorous and successful
9 prosecution of the Actions for the benefit of the Class, strongly militating in favor of
10 awarding the requested fee.

11 **D. A 17% Fee Award Is Consistent with Awards in Similar**
12 **Complex, Contingent Litigation**

13 Courts also look to fees awarded in comparable cases to determine if the
14 requested fee is reasonable. *See Vizcaino*, 290 F.3d at 1050 n.4. A 17% fee award is
15 consistent with awards in similar complex class action litigation. *See id.* at 1050
16 (awarding 28% fee of \$96.8 million settlement); *Motorola*, 2013 U.S. App. LEXIS
17 16878, at *4-*5 (awarding 27.5% fee of \$200 million settlement); *Adelphia*, 2006
18 U.S. Dist. LEXIS 84621, at *16 (awarding 21.4% fee in \$460 million settlement);
19 *Cardinal Health*, 528 F. Supp. 2d at 755 (awarding 18% fee of \$600 million

20
21 ¹² *See, e.g., In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486-CW(EDL), 2007
22 WL 4788556 (N.D. Cal. Nov. 27, 2007) (defense verdict by jury); *Robbins v. Koger*
23 *Props.*, 116 F.3d 1441, 1448-49 (11th Cir. 1997) (jury verdict of \$81 million for
24 plaintiffs against an accounting firm reversed on appeal on loss causation grounds and
25 judgment entered for defendant); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215,
26 1233 (10th Cir. 1996) (Tenth Circuit overturned securities fraud class action jury
27 verdict for plaintiffs in case filed in 1973 and tried in 1988 on the basis of 1994
28 Supreme Court opinion); *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW,
1991 U.S. Dist. LEXIS 15608, at *1-*2 (N.D. Cal. Sept. 6, 1991) (verdict against two
individual defendants, but court vacated judgment on motion for judgment
notwithstanding the verdict); *Backman v. Polaroid Corp.*, 910 F.2d 10, 18 (1st Cir.
1990) (where the class won a substantial jury verdict and motion for J.N.O.V. was
denied, on appeal the judgment was reversed and the case was dismissed – after 11
years of litigation); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 (2d
Cir. 1979) (multimillion dollar judgment reversed after lengthy trial).

1 settlement); *Lucent*, 327 F. Supp. 2d at 430 (awarding 17% fee of \$667 million
2 settlement); *Allapattah Servs. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1243 (S.D. Fla.
3 2006) (awarding 31.33% fee of \$1.06 billion settlement); *In re Brand Name*
4 *Prescription Drugs Antitrust Litig.*, No. 94 C 897, 2000 U.S. Dist. LEXIS 1734 (N.D.
5 Ill. Feb. 10, 2000) (awarding 25% fee of \$697 million settlement); *In re Initial Pub.*
6 *Offering Sec. Litig.*, 671 F. Supp. 2d 467 (S.D.N.Y. 2009) (awarding 33.30% fee of
7 \$510 million settlement); *In re Checking Account*, 830 F. Supp. 2d 1330 (S.D. Fla.
8 2011) (awarding 30% fee of \$410 million settlement); *Ohio Pub. Emps. Ret. Sys. v.*
9 *Freddie Mac*, No. 03-CV-4261 (JES), 2006 U.S. Dist. LEXIS 98380 (S.D.N.Y. Oct.
10 26, 2006) (awarding 20% fee of \$410 million settlement); *In re Vitamins Antitrust*
11 *Litig.*, No. 99-197 (TFH), 2001 U.S. Dist. LEXIS 25067 (D.D.C. July 13, 2001)
12 (awarding 34.06% fee of \$365 million settlement); *In re Dynamic Random Access*
13 *Memory (DRAM) Antitrust Litig.*, No. M:02-cv-01486-PJH, slip op. MDL-02-1486
14 (N.D. Cal. Nov. 1, 2006) (awarding 25% fee of \$326 million settlement); *In re Oxford*
15 *Health Plans, Inc. Sec. Litig.*, No. MDL 1222 (CLB), 2003 U.S. Dist. LEXIS 26795
16 (S.D.N.Y. June 12, 2003) (awarding 28% fee of \$300 million settlement); *In re*
17 *DaimlerChrysler AG Sec. Litig.*, No. 00-993 (KAJ), 2004 U.S. Dist. LEXIS 31757 (D.
18 Del. Feb. 5, 2004) (awarding 22.50% fee of \$300 million settlement). According to
19 another recent NERA report, in cases with settlements between \$100 and \$499.9
20 million, the median fee award was 22.4%, 5.4% more than the fee being sought here.
21 *Nera Mid-Year 2011* at 22 Figure 26.

22 Plaintiffs and Plaintiffs' Counsel respectfully submit, and this Court has
23 recognized, that MBS class actions involve unique and complex issues not present in
24 traditional securities class actions, including the risk related to unique standing,
25 tolling, class certification, loss causation and damages issues. Here, the Actions
26 presented an additional layer of risk given the Court's decision that Bank of America
27 was not legally responsible for Countrywide's liabilities in these Actions (*Maine*
28 *State*, Dkt. No. 255), and Countrywide's concession that it was and still is considering

1 filing for bankruptcy protection.¹³ In the most comparable MBS settlement – the
2 *Merrill Lynch* MBS settlement – the court awarded counsel a fee of 17% of the \$315
3 million settlement fund. Similarly, in the *Wells Fargo* MBS settlement, the court
4 awarded counsel a fee of 19.75% of the \$125 million settlement fund. Accordingly,
5 Plaintiffs’ Counsel’s request for a 17% fee in the more complex and successful
6 litigation of the Actions is clearly in line with fee awards in similar securities and
7 MBS class action litigation.

8 **E. The Requested Fee Is Materially Lower than the Range of**
9 **Contingent Fee Arrangements in Other Cases**

10 A fee based on the percentage method is also entirely consistent with negotiated
11 fees in the private marketplace where contingent fee attorneys typically negotiate
12 percentage fee arrangements with their clients. As explained in *In re RJR Nabisco*
13 *Sec. Litig.*, No. MDL 818 (MBM), 1992 U.S. Dist. LEXIS 12702, at *20 (S.D.N.Y.
14 Aug. 24, 1992):

15 What should govern such [fee] awards is not the essentially whimsical
16 view of a judge, or even a panel of judges, as to how much is enough in a
17 particular case, but what the market pays in similar cases.

18 If this were a private action, the customary contingent fee would likely range
19 between 30 and 40 percent of the recovery. For example, the Houston law firm of
20 Vinson & Elkins prosecuted the case of *ETSI Pipeline Project v. Burlington N., Inc.*,
21 No. B-84-979-CA, 1989 U.S. Dist. LEXIS 18796 (E.D. Tex. June 5, 1989), on a one-
22 third contingent fee basis. After obtaining a \$1 billion verdict at trial and
23 subsequently settling the case for \$635 million, Vinson & Elkins realized a fee of
24 approximately \$212 million. See Declaration of Harry Reasoner, ¶4 (submitted in *In*

25
26 ¹³ Karen Friefeld, *BofA could still put Countrywide into bankruptcy, executive says*,
27 Reuters, June 10, 2013 (citing Bank of America’s Chief Risk Officer’s testimony:
28 “One of the options that was available to us and continues to be available to us was to
put Countrywide into bankruptcy.”), available at
<http://www.reuters.com/article/2013/06/10/us-bofa-mbs-idUSBRE95916M20130610>.

1 *re Wash. Pub. Power Supply Sys. Sec. Litig.*, MDL No. 551 (D. Ariz. Nov. 30, 1990)
2 (attached hereto as Ex. C)).

3 Contingent fee percentages in similarly large and complicated cases are
4 likewise far in excess of the fee Plaintiffs' Counsel seek here. In a case involving
5 NTP Inc. and Research In Motion Ltd., the company that manufactures the popular
6 Blackberry, NTP promised its law firm, Wiley Rein & Feilding ("WRF"), a one-third
7 contingent fee. When the case settled for \$612.5 million, WRF received more than
8 \$200 million in fees, a 33% contingency. Yuki Noguchi, *D.C. Law Firm's Big*
9 *BlackBerry Payday; Case Fees of More than \$200 Million Are Said to Exceed Its*
10 *2004 Revenue*, Washington Post, Mar. 18, 2006, at D03 (attached hereto as Ex. D).¹⁴

11 **V. THE REQUESTED FEE IS REASONABLE UNDER THE**
12 **LODESTAR CROSS-CHECK**

13 The Ninth Circuit has held that the lodestar method "provides a check on the
14 reasonableness of the percentage award. Where such investment is minimal, as in the
15 case of an early settlement, the lodestar calculation may convince a court that a lower
16 percentage is reasonable. Similarly, the lodestar calculation can be helpful in
17 suggesting a higher percentage when litigation has been protracted." *Vizcaino*, 290
18 F.3d at 1050 (approving fee award equal to 3.65 multiplier or 28% of \$96.8 million
19 common fund). Here, as in *Vizcaino*, the protracted nature of the litigation and the
20 work undertaken by Plaintiffs' Counsel as detailed herein and in the accompanying
21 Joint Declaration submitted on behalf of Robbins Gellar and Kessler Topaz and the
22 Reiser Declaration submitted on behalf of Cohen Millstein, suggests a higher
23 percentage award would be appropriate. *Id.*

24 The lodestar method, as set forth in the seminal cases *Lindy Bros. Builders, Inc.*
25 *v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) ("*Lindy I*"),
26 and *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d

27 ¹⁴ If any objections are received following this submission, Plaintiffs' Counsel will
28 address them in their reply briefing to be filed on October 21, 2013.

1 102 (3d Cir. 1976) (“*Lindy II*”), is a two-step process. *See Lindy I*, 487 F.2d at 167-
2 68. The first step requires ascertaining the “lodestar” figure by multiplying the
3 number of hours reasonably worked by the current hourly rate of counsel. *Id.* at 167.
4 “Calculation of the lodestar, however, is simply the beginning of the analysis.” *In re*
5 *Warner Commc’ns Sec. Litig.*, 618 F. Supp. 735, 747 (S.D.N.Y. 1985), *aff’d*, 798 F.2d
6 35 (2d Cir. 1986). In the second step of the analysis, a court adjusts the lodestar to
7 take into account, among other things, the risk of non-payment, the result achieved,
8 the quality of representation, the complexity and magnitude of the litigation, and
9 public policy considerations. *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 583 (3d
10 Cir. 1984); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d
11 283, 341 (3d Cir. 1998). To account for the foregoing factors the court then applies an
12 appropriate multiplier to the lodestar number.

13 The lodestar for the services performed by Plaintiffs’ Counsel in these Actions
14 is \$40,209,519. Therefore, the requested fee of 17% (*i.e.*, \$85 million) represents a
15 multiplier of approximately 2.11 times Plaintiffs’ Counsel’s collective lodestar. This
16 multiplier is comparable or lower than that awarded by other courts in similar cases,
17 thus demonstrating the reasonableness of the requested fee. *See Merrill Lynch MBS*
18 *Settlement* (2.3 multiplier); *Wells Fargo MBS Settlement* (2.8 multiplier); *see also*
19 *Cardinal Health*, 528 F. Supp. 2d at 755 (multiplier of 5.9 for a \$108 million fee in a
20 \$600 million settlement); *Adelphia*, 2006 U.S. Dist. LEXIS 84621, at *16 (2.89
21 multiplier for a \$97.36 million fee in a \$460 million settlement); *In re NASDAQ Mkt.-*
22 *Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (3.97 multiplier for a
23 \$143.7 million fee in a \$1.027 billion settlement). District Courts within this Circuit
24 have likewise awarded similar or higher multipliers. *See, e.g., In re Brocade Sec.*
25 *Litig.*, No. C 05-02042 CRB, slip op. at 13 (N.D. Cal. Jan. 26, 2009) (3.5 multiplier);
26 *In re Veritas Software Corp. Sec. Litig.*, No. C-03-0283 MMC, 2005 U.S. Dist. LEXIS
27 30880, at *42-*43 (N.D. Cal. Nov. 15, 2005) (4.0 multiplier); *Buccellato v. AT&T*,
28 No. C10-00463-LHK, 2011 U.S. Dist. LEXIS 85699, at *3-*5 (N.D. Cal. June 30,

2011) (4.3 multiplier). A multiplier of time is needed to reward attorneys for assuming the risk of non-payment in these highly risky, complex MBS class actions. Thus, the requested fee is reasonable under both the percentage method and the lodestar cross-check method.

VI. LEAD COUNSEL ARE ENTITLED TO AN AWARD OF THEIR REASONABLE LITIGATION EXPENSES

Plaintiffs' Counsel also request an award of expenses in the amount of \$2,977,145, incurred in connection with the prosecution and resolution of the Actions on behalf of the Class, plus interest on such amount at the same rate as earned by the Gross Settlement Fund. Attorneys who create a common fund for the benefit of a class are entitled to be paid from the fund for their out-of-pocket expenses incurred in creating the fund so long as the submitted expenses are reasonable, necessary and directly related to the prosecution of the action. *See Omnivision*, 559 F. Supp. 2d at 1048; *see also In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996) ("Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit by the settlement."). Expenses are compensable in a common fund case if the particular expense is of the type typically billed by attorneys to paying clients in the marketplace.¹⁵ The categories of expenses for which Plaintiffs' Counsel seek payment here are of the type routinely charged to paying clients and, therefore, should be awarded.

¹⁵ *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (expenses normally charged to a fee-paying client approved); *Media Vision*, 913 F. Supp. at 1366. Decisions in other circuits confirm this practice. *Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 725-26 (10th Cir. 1993) (expenses reimbursable if such charges would normally be billed to client) (citing *Bee v. Greaves*, 910 F.2d 686, 690 (10th Cir. 1990)); *Gottlieb v. Wiles*, 150 F.R.D. 174, 185 (D. Colo. 1993), *rev'd on other grounds sub nom.*, *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994); *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995) (expenses recoverable when customary to bill clients separately for them); *Associated Builders & Contractors, Inc. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 380 (5th Cir. 1990) (all reasonable out-of-pocket expenses recoverable because the costs are normally charged to fee-paying clients).

1 Plaintiffs' Counsel's expenses are itemized and described in the individual
2 declarations of Plaintiffs' Counsel submitted herewith. These expenses include,
3 among others, court fees, service of process, experts' fees, mediation costs, online
4 legal and factual research, database hosting charges, travel costs, photocopying,
5 telephone, fax and postage expenses. These expense items are billed separately by
6 Plaintiffs' Counsel, and such charges are not duplicated in their billing rates.

7 The Notice informed potential Class Members that Plaintiffs' Counsel would
8 apply for expenses in an amount not to exceed \$4 million plus interest earned on this
9 amount at the same rate as the Gross Settlement Fund. Accordingly, Plaintiffs'
10 Counsel respectfully request an award of Plaintiffs' Counsel's expenses, plus interest.

11 **VII. CONCLUSION**

12 For the foregoing reasons, Plaintiffs' Counsel respectfully requests that the
13 Court award attorneys' fees of 17% of the Gross Settlement Fund and expenses of
14 \$2,977,145, plus interest.

15 DATED: September 23, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2013, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 23, 2013.

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